IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 23, 2006 Session

RANDY E. SIMPSON v. JOHN DOE, AN UNKNOWN/UNIDENTIFIED DRIVER

Appeal from the Circuit Court for Hamilton County
No. 99C1745 Samuel H. Payne, Judge

No. E2005-01699-COA-R3-CV - FILED JUNE 13, 2006

As a result of an automobile accident, Randy E. Simpson ("Plaintiff") sued John Doe, an unknown/unidentified driver. BlueCross BlueShield of Tennessee, Inc. ("BlueCross/BlueShield") sought and was granted leave to intervene in the suit to protect its subrogation and right of reimbursement claims. Plaintiff and his uninsured motorist carrier agreed to settle Plaintiff's case and the Trial Court entered an order dismissing all claims with the exception of BlueCross/BlueShield's subrogation claims. BlueCross/BlueShield then filed a motion for summary judgment, which the Trial Court granted. Plaintiff appeals to this Court. We find that there are genuine issues of material fact with regard to whether Plaintiff was made whole by the settlement, and we reverse the grant of summary judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Robert P. Rayburn, Chattanooga, Tennessee for the Appellant, Randy E. Simpson.

Michael A. Anderson, Chattanooga, Tennessee for the Appellee, Bluecross Blueshield of Tennessee, Inc.

OPINION

Background

After being involved in an automobile accident, Plaintiff sued John Doe, an unknown/unidentified driver claiming, in part, that a John Doe driving a dark car was traveling on the wrong side of the road without lights and forced Plaintiff's vehicle off the road. Plaintiff claimed that "[i]n attempting to remain on, or regain, the road right of way and avoid going down a steep embankment, [he] turned sharply back onto the roadway causing his vehicle to overturn thereby causing injury to himself." Plaintiff and his uninsured motorist carrier agreed to participate in non-binding mediation.

BlueCross/BlueShield, Plaintiff's health insurance carrier, filed a motion to intervene seeking to protect its contract rights and subrogation and right of reimbursement claims. By order entered October 24, 2001, the Trial Court granted BlueCross/BlueShield the right to intervene as a petitioner in the suit.

Plaintiff and his uninsured motorist carrier reached an agreement and settled Plaintiff's case. The Trial Court entered an order of dismissal on March 20, 2003, dismissing all claims with prejudice with the exception of BlueCross/BlueShield's subrogation claims, which were to be satisfied, if necessary, by Plaintiff without further claim or liability against the uninsured motorist carrier.

BlueCross/BlueShield filed a motion for summary judgment regarding its subrogation and right of reimbursement claims claiming, in part, that it had paid medical expenses of $10,591.18 as a result of injuries that Plaintiff sustained in the automobile accident and that Plaintiff had voluntarily settled his claims with the uninsured motorist carrier for $75,000, an amount substantially less than the limits of Plaintiff's coverage.

Plaintiff opposed the motion for summary judgment, in part, by filing Plaintiff's affidavit in which Plaintiff asserted that he suffered multiple injuries as a result of the accident, was hospitalized, underwent surgery, and suffers continuing "pain and discomfort on a daily basis." Plaintiff's affidavit asserted that Plaintiff's medical expenses for the injuries that resulted from the accident totaled $40,286.81, that he lost income in the amount of $17,080.00, and that he has been unable to work on a full-time basis since the accident and has "basically lost my excavation business." Plaintiff also filed the affidavit of his attorney, Robert P. Rayburn, Sr., which asserted, in pertinent part:

> Following the completion of discovery, I entered into settlement discussions with counsel for [Plaintiff's uninsured motorist carrier], in late 2002/early 2003. It was my considered opinion, based upon twenty-five (25) years of experience, that the value of [Plaintiff's] case from the standpoint of his injuries, damages, losses,

> scarring, pain and suffering was $300,000.00, a sum that would have made him "whole." However, the facts of the accident created a serious issue on liability.…We did locate a witness that saw [Plaintiff's] vehicle leave the highway and overturn when he attempted to re-enter the highway. This witness was able to provide a rudimentary description of the other vehicle and driver. However, she was diagnosed with terminal cancer after she was interviewed and provided us with a written statement. Her memory on several key facts, at the time the settlement discussions started, had failed considerably due to her illness and the medications she was taking.…The best offer we received during mediation was $75,000.00. I advised my client to accept the offer even though it did not make him "whole" as far as his injuries, damages, losses, scarring, pain and suffering were concerned because it was my opinion that he would have a difficult time surviving a motion for a directed verdict at trial based on the evidentiary requirements of **TCA 56-7-1202(e)(1)(A) & (B).**

The Trial Court granted BlueCross/BlueShield's motion for summary judgment and entered a judgment in favor of BlueCross/BlueShield for $10,591.18, plus prejudgment interest at the rate of 10%, and attorney's fees and expenses, for a total judgment of $16,712.36. Plaintiff appeals to this Court.

Discussion

Although not stated exactly as such, Plaintiff raises one issue on appeal: whether the Trial Court erred in granting summary judgment.

In *Blair v. West Town Mall,* our Supreme Court reiterated the standards applicable when appellate courts are reviewing a motion for summary judgment. *Blair v. West Town Mall,* 130 S.W.3d 761 (Tenn. 2004). In *Blair*, the Court stated:

> The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tennessee Rule of Civil Procedure 56 have been met. *See Staples v. CBL & Assoc., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *Hunter v. Brown,* 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Central South,* 816 S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: 1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and 2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *Staples,* 15 S.W.3d at 88.
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> When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact.
>
> To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.

Blair, 130 S.W.3d at 763, 767 (quoting *Staples*, 15 S.W. 3d at 88-89) (citations omitted)).

Our Supreme Court has also provided instruction regarding assessing the evidence when dealing with a motion for summary judgment stating:

> The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. *See Robinson v. Omer*, 952 S.W.2d at 426; *Byrd v. Hall*, 847 S.W.2d at 210-11. Courts should grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. *See McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 89 (Tenn. 2000).

Our Supreme Court has held:

> our case law is clear that an insurer is not entitled to subrogation unless and until the insured has been made whole for his or her losses, regardless of what language is contained in the contract. In our view, the same rule must apply to a contract that, in effect, seeks to evade the "made whole" doctrine by replacing or supplementing the law of subrogation with a right of reimbursement.

York v. Sevier County Ambulance Auth., 8 S.W.3d 616, 621 (Tenn. 1999).

Blue Cross/BlueShield concedes that Plaintiff must be made whole for his damages resulting from the accident before it is entitled to any subrogation or reimbursement. Blue Cross/Blue Shield argues that the grant of summary judgment in its favor was correct, in part, by relying on this Court's opinion in *Abbott v. Blount County*, in which this Court stated:

> [I]t is clear that, as a general rule, an insured may not utilize the made whole doctrine to defeat an insurer's subrogation interest by settling out of court with a third-party tortfeasor without the agreement or consent of the insurer. A limited exception exists only where it is clear to the court that the amount recovered by the settlement is the best recovery possible and that the insured's affirmatively demonstrated damages exceed the combined amount recovered by the settlement and amounts paid by the insurer. The "underlying facts" to be considered by the court in determining whether the insured has been made whole by the settlement include more than the fact that the insured has suffered serious injury. They include evidence of damages; evidence that the recovered amount was less than those damages; and evidence that the settlement was the best possible in light of all the circumstances.

Abbott v. Blount County, No. E2004-00637-COA-R3-CV, 2005 Tenn. App. LEXIS 469, at *16-17 (Tenn. Ct. App. Aug. 9, 2005), *appl. perm. appeal granted Dec. 19, 2005*. Blue Cross/Blue Shield argues that the plaintiff in *Abbott* "failed to meet her burden of proving she was not made whole, despite the extensive injuries, where she failed to present proof on the extent of her damages beyond the medical expenses," and that similarly, Plaintiff in this case failed to prove that he was not made whole by the settlement.

The plaintiffs in *Abbott* filed a declaratory judgment action asking the trial court to hold that they had not been "made whole" in their settlement with the tortfeasors and that any subrogation claim by the defendant insurer be denied. The trial court granted the *Abbott* plaintiffs summary judgment. This Court reversed the trial court's award of summary judgment.

Two important points must be made about *Abbott*. First, in *Abbott*, this Court held that summary judgment was inappropriate, in part, because genuine issues of material fact existed regarding whether the *Abbott* plaintiff was made whole by the settlement. *Id*. at *25-26. Second, our Supreme Court granted an application for permission to appeal in the *Abbott* case in December of 2005, and, as of the time of the filing of this Opinion, had not yet released its opinion in that case. *Abbott v. Blount County*, No. E2004-00637-SC-R11-CV, 2005 Tenn. LEXIS 1151, at *1-2 (Tenn. Dec. 19, 2005).

In its appellate brief, Blue Cross/Blue Shield argues:

> Since the Plaintiff may not have recovered anything had the case gone to trial, a $75,000 settlement surely must have made Plaintiff more than whole. A jury verdict is the only conclusive evidence of what would make a plaintiff whole, and a jury may well have awarded Plaintiff less than $75,000 under the facts of the case.

While it may be true that a jury could have awarded Plaintiff less than $75,000, this assertion does not support a finding that $75,000 "must have made Plaintiff more than whole." We disagree that a jury verdict is the "only conclusive evidence of what would make a plaintiff whole…." The fallacy of BlueCross/BlueShield's argument is best shown by taking the situation where a plaintiff suffers catastrophic injuries but liability is questionable at best, and in fact the jury finds no liability. BlueCross/BlueShield's position would lead to the conclusion that even in such a case as that, where the plaintiff recovers nothing, the plaintiff "must have [been] made. . . more than whole." Clearly, such would not be the case.

Likewise, this analogy also shows the fallacy of BlueCross/BlueShield's argument that Plaintiff "is estopped from arguing that he was not made whole since he voluntarily settled his claims for less than his UM limits." To put it as clearly as possible, the fact that a plaintiff settles a questionable liability case for an amount less than the applicable insurance limits does not, in and of itself, conclusively establish that the plaintiff was made whole. While such a settlement may be a fact relevant to that issue, it is not conclusive standing alone.

BlueCross/BlueShield argues in its brief that "[Plaintiff] failed to prove that he was not made whole." BlueCross/BlueShield's argument misses the point at this summary judgment stage. Plaintiff as the non-moving party had no obligation to prove at the summary judgment stage that he was not made whole, but rather had only an obligation to show "the existence of disputed, material facts which must be resolved by the trier of fact." *Blair*, 130 S.W. 3d at 767 (quoting *Staples*, 15 S.W. 3d at 88). Plaintiff did exactly that by showing through his affidavit and the affidavit of his attorney that genuine issues of material fact exist regarding whether the settlement made Plaintiff whole. Given this, we reverse the grant of summary judgment.

Conclusion

The judgment of the Trial Court is reversed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellee, Blue Cross Blue Shield of Tennessee, Inc.

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D. MICHAEL SWINEY, JUDGE